SUPREME COURT, U. S.

No. 1271

FILED

APR 25 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

LEE MANSELL GILSTRAP and MARCUS RANDOLPH MARTIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1968. A petition for rehearing was denied on March 1, 1968. The petition for a writ of certiorari was filed on March 28, 1968. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1952, prohibiting the use of interstate commerce facilities to promote illegal activities, is constitutional.

2. Whether documents reflecting one of the transactions underlying the prosecution were erroneously admitted into evidence.

STATEMENT

In the United States District Court for the Northern District of Georgia, petitioners and others [1] were convicted of conspiring to use the facilities of interstate commerce with intent to promote unlawful (gambling) activities in the State of Georgia, in violation of 18 U.S.C. 1952. Petitioner Gilstrap was also convicted of three substantive violations of that statute. Gilstrap was sentenced to imprisonment for two years, and was fined $7,500.00. Martin was sentenced to imprisonment for one year and one day, with sentence suspended. The court of appeals affirmed (Pet. App. A1-A9).

The government's principal witness was Stephen Price, an unindicted co-conspirator. He testified that, in January 1965, Gilstrap and co-defendant Samuel Coley asked him to order gambling paraphernalia

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[1] Co-defendant Fred Mullis entered a plea of nolo contendere. Co-defendant Samuel Coley was convicted on all counts in which he was charged and did not appeal.

from Christy and Jones, Inc. ("C. & J."), a Las Vegas gambling supplier (Tr. 31-32). Pursuant to their directions, Price—identifying himself as Coley—telephoned C. & J. and spoke to one Sullivan (Tr. 32-34). Sullivan stated that he would have to check into the order, and asked Price to call back the following evening (Tr. 33). When he telephoned the next day, Price ordered approximately $1900 worth of gambling equipment (Tr. 34-35). After Gilstrap or Coley gave him approximately $1900 in cash, he purchased a Western Union money order and forwarded it in payment for the merchandise ordered (Tr. 43-45). One week later, Price again telephoned Sullivan to ask about the progress of the order. He was told that it was being shipped by the Ringsby trucking firm, a trucking line operating out of St. Louis, Missouri (Tr. 36-37). After various telephone calls were made in an attempt to trace the shipment (Tr. 39-42), Price learned that the equipment had arrived in Atlanta. He so notified Coley (Tr. 42-43). The equipment was picked up from the trucking line by Fred Mullis (identifying himself as Sam Coley) (Tr. 160-163). Coley then rented a building in which he set up a gambling business equipped with gambling merchandise similar to that ordered by Price (Tr. 47-53, 169-174). Price and petitioner Martin were employed at this establishment by Gilstrap (Tr. 48, 51).

Corroborating evidence, including telephone toll records, bills of lading, and other documents, showed that telephone calls charged to Coley had been made to Las Vegas (Tr. 340-341, 397-398; Govt. Exh. 6), and to the shipping lines (Tr. 140-146); that a money

order in the amount of $1900 had been sent to Las Vegas (Tr. 135-140); that merchandise, consigned to Sam Coley from Sullivan, had been shipped to Atlanta (Tr. 7-10, 151-152, 161-164; Govt. Exhs. 1, 3); and that petitioners conducted a gambling enterprise in violation of Georgia law (Tr. 48-52, 418-419).

ARGUMENT

1. Petitioners challenge the constitutionality of 18 U.S.C. 1952 on two grounds: that the statute is unduly vague, and that it exceeds the powers delegated to Congress by the states. Not only is it conceded, however (Pet. 7), that the statute has been consistently sustained against contentions that it is impermissibly vague (*United States* v. *Barrow*, 363 F.2d 62 (C.A. 3), certiorari denied, 385 U.S. 1001; *United States* v. *Zizzo*, 338 F.2d 577 (C.A. 7), certiorari denied, 381 U.S. 915; *Turf Center, Inc.* v. *United States*, 325 F.2d 793 (C.A. 9); *Bass* v. *United States*, 324 F.2d 168 (C.A. 8)), but the courts have also uniformly rejected claims that it was enacted in excess of Congressional authority (*United States* v. *Barrow*, *supra*; *Marshall* v. *United States*, 355 F.2d 999 (C.A. 9), certiorari denied, 385 U.S. 815), that it invades the powers reserved to the States by the Tenth Amendment (*United States* v. *Barrow*, *supra*; *Marshall* v. *United States*, *supra*; *United States* v. *Zizzo*, *supra*), and that it improperly restricts the right to travel (*United States* v. *Zizzo*, *supra*). Contrary to petitioners' speculation (Pet. 8-10), the statute does not "chill" legitimate travel or restrict the activities of every person who once traveled in interstate com-

merce with some untoward intent. The statute plainly concerns itself only—as in this case—with those persons who travel in or use the facilities of interstate commerce with the specific intent to promote one of the crimes defined in that section and who thereafter perform some act in furtherance of the unlawful intent.

2. During the investigation of this case, an F.B.I. Agent, pursuant to a warrant, searched Sullivan's residence in Las Vegas, and the premises of C. & J. At Sullivan's, the agent seized a folder of invoices including one reflecting the sale of gambling equipment here involved (Tr. 200-203; Govt. Exh. 6). At C. & J. he seized a "Rol-o-dex" file which also corroborated the occurrence of the transaction (Tr. 204-205; Govt. Exh. 7).[2] Over petitioners' objection that the records were hearsay, both exhibits were received in evidence (Tr. 206, 420-421).

Although the government did not undertake to qualify the records formally for admission under the Official Records Act (28 U.S.C. 1732), we submit that their introduction into evidence did not constitute prejudicial error. First, the very fact that C. & J. and Sullivan (its employee) had in their possession documents purporting to record the transaction alleged by the government to have taken place was a circumstance which the jury, without violating the hearsay rule, could consider in determining whether the

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[2] While neither exhibit is before this Court, we have been advised that Exhibit 6 reflected the transaction on a C. & J. invoice sheet, and included the telephone number of that firm.

transaction in fact occurred. See *United States* v. *Sessin*, 84 F.2d 667 (C.A. 10); McCormick on *Evidence*, § 229, pp. 478-479 (1954); American Law Institute, *Model Code of Evidence*, § 501, pp. 224-225 (1942). In any event, as the court below noted (Pet. App. A8), the exhibits "were merely corroborative of prior oral testimony in the case."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1968.

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